Mike Yurosek & Son, Inc. ***and*** **Santos Diaz.** Case 31–CA–18500

March 25, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The principal issue in this case is whether the Respondent discharged the involved employees for engaging in protected concerted activity.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

On March 31, 1992, the Board issued a Decision and Order[4] remanding this proceeding to the administrative law judge to reopen the record for further appropriate action and, at the close of the record, to issue a decision consistent with that Decision and Order. In that decision the Board reversed the judge's earlier decision granting the Respondent's motion to dismiss the complaint. That motion was made at the end of the General Counsel's case-in-chief and was based on the assertion that the General Counsel failed to establish a prima facie case.

In its prior decision, the Board held that the General Counsel had established a prima facie case of concerted activity based on the facts that the employees, as a group, had protested the change in their work schedule when it was introduced in early September, and that their identical actions in refusing to work overtime on September 24 were a logical outgrowth of that concerted protest. Further, the Board found that the Respondent's actions in treating the employees as a group supported the inference that the Respondent believed that the employees were engaged in concerted activity.[5]

As noted in our earlier decision, when the schedule was changed by Manager Garza in early September, the employees were told as a group and they protested to management as a group. On September 24, 1990, the employees were approached individually by Supervisor Ortiz and told to work an extra hour. Each employee reacted in an identical fashion by punching out at the originally scheduled time. The employees were then approached by Ortiz at the timeclock as a group and told not to punch in the next morning.

On September 25, Respondent called the employees as a group to the office, where they were called in individually and asked why they did not work the extra hour as directed. Each employee stated it was because he had to honor the schedule as previously posted by Garza. The employees waited as a group while the management representatives decided their fate, and were then called in individually and terminated.

In our earlier decision, we stated that, on September 25, the employees were interviewed by the Respondent's representatives as a group and fired as a group. The additional evidence presented at the reopened hearing indicates that the employees were interviewed individually and terminated individually. The General Counsel does not dispute this evidence. However, such evidence does not negate the fact that the employees were otherwise treated as a group throughout this incident and is insufficient to rebut the General Counsel's prima facie case of concerted activity or the inference that the Respondent believed that they were engaged in concerted activity.

Our earlier decision also found that the General Counsel had established that the employees' refusal to work the extra hour requested of them on September 24, 1991, was protected activity. We reaffirm our conclusion that the refusal to work was protected. In this regard, we conclude that the refusal was not part of an intermittent work stoppage. The employees refused to work the extra hour on only one occasion. There was no indication that the employees' refusal was one of a series of intermittent strikes. See *Polytech, Inc.*, 195 NLRB 695, 696 (1972). Nor was the refusal to work overtime an effort by employees to set their own terms and conditions of employment. The employees had been given one schedule by Manager Garza and were then given contrary instructions by Supervisor Ortiz. Thus, the employees were not trying to set their own hours, they were simply protesting the apparent inconsistency in Respondent's setting of hours.[6]

[1] On November 3, 1992, Administrative Law Judge James S. Jenson issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In his supplemental decision, the judge characterized the four discharged employees as ''economic strikers'' and stated that because the record failed to show that the Respondent replaced the four employees prior to their reporting for work on the morning of September 25, the Respondent was obliged to reinstate them when they offered to return to work. In light of the fact that these employees were discharged, we need not pass on the judge's finding that the employees were unreplaced economic strikers.

[4] 306 NLRB 1037.

[5] Member Raudabaugh concurred solely on the basis of this latter ground.

[6] The Respondent excepts to the characterization of the extra hour the employees were requested to work as ''overtime,'' stating that the employees were scheduled to work only a 6-1/2-hour day and

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The Respondent also excepts to the judge's finding that the employees were protesting the directive given by Ortiz to work an additional hour, despite the employees' testimony that they were not ''protesting'' anything. How an employee subjectively characterizes his or her own actions is not determinative in the Board's objective analysis of whether that employee has engaged in protected, concerted activity. The record shows that the employees were refusing to work the extra hour because of Respondent's inconsistency concerning their hours of work. Viewed objectively, this action is properly interpreted as a work protest.

Based on the above, we affirm the judge's supplemental decision.[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mike Yurosek & Son, Inc., Lamont, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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thus the extra hour requested of them was not ''overtime'' as defined by any law or standard industrial practice. The issue here is not whether the employees refused to work ''overtime'' or ''extra time,'' but rather whether they were attempting to set their own hours of work by engaging in an intermittent work stoppage.

[7] The Respondent further excepts to the judge's reliance on the interpretation of Board case law as set forth in our original decision, and to the judge's failure to apply a *Wright Line* analysis to the facts in this case. 251 NLRB 1083 (1980). In support of these exceptions, the Respondent sets forth the same interpretation of Board case law that we considered and rejected in our original decision. Further, we find a *Wright Line* analysis inherent in the judge's supplemental decision. The General Counsel established by a preponderance of the evidence that the employees' protected concerted activity was the reason for their discharges. The Respondent failed to present evidence sufficient to establish that the discharges would have occurred even absent the protected concerted activity. Accordingly, we adopt the judge's finding of a violation.

Member Raudabaugh joins his colleagues in their adoption of the judge's finding of a violation. However, as to the issue of concert, he relies solely on the fact that the Respondent discharged the employees because it believed that the employees were acting concertedly in refusing to work the extra hour. See *Daniel Construction Co.*, 277 NLRB 795 fn. 4 (1985).

Bernard Hopkins, for the General Counsel.
Richard B. Galtman (Finkle & Barsamian), of Fresno, California, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. On July 10, 1991, I dismissed the complaint in this matter at the conclusion of the General Counsel's case-in-chief on the ground the General Counsel had failed to prove a prima facie case, i.e., that the alleged discriminatee's conduct was neither concerted nor protected. Upon the General Counsel's exceptions, the Board disagreed with my decision and remanded the case to me to reopen the record for further appropriate action, and at the close of the record to issue a decision consistent with the Board's Decision and Order.[1] In accordance with the remand order, the record was reopened and further hearing held on July 9 and 10, 1992 in Bakersfield, California.

The parties were given full opportunity to introduce evidence, examine and cross-examine witnesses, to argue orally, and to file briefs. Both the General Counsel and Respondent filed briefs which I have carefully considered.

Upon the entire record, including the initial and the reopened record, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Mike Yurosek & Son, Inc., a California corporation, is engaged in the business of processing, packing, and distributing fresh vegetables. It annually sells and ships goods and services valued in excess of $50,000 to customers or businesses located outside the State of California. It is admitted and found that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. ISSUE

Whether Santos Diaz, Antonio Lopez, Rafael Naraes,[2] and Jose Rivera were unlawfully terminated for engaging in a protected concerted refusal to work overtime, or lawfully for insubordination.

III. THE SETTING

Respondent's operations are cyclical, having the lowest period of production in August and September, building up to a peak from October to February, and slowing down in March and April, through mid-July. Depending on the cycle, it employs from 800 to 1200 employees. At all times material, Daryl Valdez was the vice president of human resources, Med Garcia was personnel manager, Steve Beck was director of production control, Juan Garza[3] was warehouse manager, and Jamie Ortiz was the dock foreman. All are alleged and admitted to be Respondent's agents and supervisors. In September 1990,[4] the day-shift dock crew was comprised of Narez, Lopez, Rivera, Diaz, and Jesus Cougas.[5] In early September, Garza told the five employees on the day shift that he was going to reduce their hours to approximately 36 hours a week. Valdaz testified that the reduction in hours was made because the amount of carrots coming into the plant was at its lowest and it was necessary to reduce hours and/or personnel. The employees protested that the reduction in hours wouldn't give them enough time to finish the work. Garza responded they would have to work that schedule

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[1] 306 NLRB 1037.

[2] Sometimes referred to in the record as Rafael Cachu and Rafael Narez.

[3] Garza's employment terminated in March 1992. Thus, when he testified at the reopened hearing, he was not in Respondent's employ.

[4] All dates are in 1990.

[5] Cougas was not involved in the incidents at issue.

whether they liked it or not and that they were to punch out at exactly the time he told them to punch out.

On September 24, consistent with the new schedule announced by Garza, the day-shift was scheduled to work from 10 a.m. to 4:30 p.m. Dock Foreman Ortiz testified that after Garza told him to have the dock crew work an extra hour that day, he asked each individually to do so during a break from 3:30 to 3:45 p.m. He testified that when he asked Diaz to stay an extra hour, Diaz gave a negative nod of his head and said he was going to leave at 4:30. He claimed Nareas, Lopez, and Rivera each said ''Okay'' when asked to stay an extra hour. He testified that as he observed the four of them leave at 4:30, he asked if they were going to stay another hour and that Lopez responded in the negative, that they were going home. Ortiz' testimony is inconsistent with that of the four employees whom I credit. Naraes testified he wasn't approached by Ortiz until about 4:25 p.m. that day and told to work another hour, and that he responded that Garza had fixed the schedule and that it had to be done that way. He then went to the timeclock and punched out with the other three. Diaz testified that when Ortiz approached him about 4:25 p.m. and was told to work an extra hour that he said no ''because Juan Garza told us that we had to leave at [a] . . . certain hour.'' While Lopez' testimony is not clear, it appears he told Ortiz that he had to respect what he was told before by Garza. Rivera testified that he was putting ice on a truck a few minutes before 4:30 p.m. and was unable to hear what Ortiz said. He asked Lopez what Ortiz said, and Lopez told him that Ortiz wanted them to stay for another hour.

All four proceeded to punch out at 4:30 p.m. As they were walking away, Ortiz asked if they were going to stay and Lopez responded ''no.'' Ortiz told the four that if they punched out, they were to wait for him in the dining room the next day.

All four employees testified there was no discussion among them about what response to make to the overtime request between the time that Ortiz told them to work another hour and the time they punched out.

The next day, September 25, Ortiz told Garza that the four hadn't stayed the additional hour the day before. Garza told Ortiz to have the men wait, that he wanted to talk to them. The four were then called to the personnel office where they were called in individually and interviewed by Garza, Ortiz, Valdez, Beck, and Garcia. When each was asked why he didn't work the extra hour, each responded that he was following the schedule. Valdez testified that after the interviews, while the employees were waiting in the ''anteroom,'' the company officials concluded the men had been insubordinate and, based on company policy, should be terminated. The employees were then terminated for insubordination for refusing to work as directed. The record contains as Respondent's Exhibit 4, an employee handbook which lists as an example of acts which would immediately precipitate involuntary terminations, ''Refusal to work as directed (insubordination).''

Discussion

The Respondent argues the individual actions taken by the employees in deciding not to work overtime was not concerted, citing cases cited by me in my initial decision wherein I found their action was not concerted. Relying on the fact each of the four employees testified that no discussion or planning took place between them, it is claimed the record is barren of evidence or testimony that the employees acted as a group or took any action remotely resembling a joint employee endeavor. Respondent also argues it didn't perceive the individual responses as concerted, nor did it treat the employees as a group. Seeking to distinguish the instant case from those cited by the Board in its initial decision, specifically *Salisbury Hotel*, 283 NLRB 685 (1987) and *Every Woman's Place*, 282 NLRB 413 (1986), enfd. mem. 833 F.2d 1012 (6th Cir. 1987), Respondent argues that unlike the employees in those cases, the four employees in the instant case did not discuss their refusal to work overtime or otherwise make ''common cause'' with each other or any fellow employees. It is argued that those cases are misapplications of *Meyers I* and *Meyers II*,[6] and hence bad law. I am, of course, bound by the Board's interpretation of those cases and its initial decision in this case.

Respondent further argues that the individual actions of the employees did not amount to a protest as evidenced by the fact each testified he was not protesting anything but instead obeying the work schedule. However, in the initial decision the Board stated that while ''it is not crystal clear, at this stage of the litigation, whether the employees were protesting (1) the Garza reduction in hours, (2) the Ortiz direction that they work an extra hour, or (3) a combination of the two, i.e., they felt they were being subjected to inconsistent requirements. . . . In any event such a protest about any or all of the foregoing would be a protest about hours of work.'' At this stage of the proceedings it is clear that they were protesting the Ortiz direction that they work an extra hour. Whether their response in refusing to work the overtime is viewed as a concerted protest because it was unscheduled or a protest against a last-minute request to do so, their concerted refusal to work unscheduled overtime was entitled to the protection of the Act.

In the initial Decision and Order in this case the Board went on to state:

> Employees have the right to engage in a concerted refusal to work, even when the assignment is to work overtime. Only when employees repeatedly refuse to perform mandatory overtime does their conduct become unprotected by the Act because that conduct constitutes a recurring or intermittent strike, which amounts to employees unilaterally determining conditions of work.[6] In the instant case, the employees refused to work overtime on only one occasion. There was no indication that they were planning to intermittently refuse to work overtime thereafter. In these circumstances, the employees concerted refusal to work overtime on September 24 was protected by the Act.[7] [306 NLRB at 1039]

[6] *Sawyer of Napa, Inc*., 300 NLRB 131 (1990).
[7] Id.

Employees may protest and seek to change any term or condition of employment, including working overtime, by

[6] *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), and *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1421 (D.C. Cir. 1987).

engaging in a work stoppage. If they haven't been replaced while they were away from work, they must be reinstated when they offer to return. The Respondent here could have acted immediately after the four employees refused to work overtime by replacing them with other employees. It failed to do so. When they left work on September 24, the four became ''economic strikers'' and entitled to reinstatement unless the Respondent determined what their intentions were for the future and warned them that it would regard future refusals to work overtime as grounds for disciplinary action. The record in the reopened hearing failing to show the four employees were replaced prior to reporting for work the morning of September 25, and the Respondent having failed to establish that the employees were planning to intermittently refuse to work overtime thereafter, the Respondent was obligated to reinstate them when they offered to return on September 25. *Sawyer of Napa*, supra; *First National Bank of Omaha v. NLRB*, 413 F.2d 921 (8th Cir. 1969), enfg. 171 NLRB 1145 (1968). I therefore find that the Respondent violated Section 8(a)(1) of the Act in discharging Diaz, Lopez, Naraes, and Rivera because of their engagement in a work stoppage, i.e., their refusal to work overtime on September 24.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaging in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Santos Diaz, Antonio Lopez, Rafael Naraes, and Jose Rivera, the Respondent has interfered with, restrained, or coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that the Respondent be ordered to cease and desist therefrom and from any like or related manner infringing upon its employees' Section 7 rights, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated the Act by discharging Santos Diaz, Antonio Lopez, Rafael Naraes, and Jose Rivera, I shall recommend that Respondent offer each of them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges. I shall also recommend that the Respondent make them whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful discharges, with backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that the Respondent remove from its records any reference to the unlawful discharges, provide the discriminates with written notice of the removal, and inform them that the unlawful discharges will not be used as a basis for future personnel actions concerning them. See *Sterling Sugars*, 261 NLRB 472 (1982).

On the basis of the foregoing findings of fact, conclusions of law, and on the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I issue the following recommended[7]

ORDER

The Respondent, Mike Yurosek & Son, Inc., Lamont, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for striking or engaging otherwise in concerted protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Santos Diaz, Antonio Lopez, Rafael Naraes, and Jose Rivera immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharges of Santos Diaz, Antonio Lopez, Rafael Naraes, and Jose Rivera and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Lamont California facility copies of the attached notice marked ''Appendix.''[8] Copies of the notice in English and Spanish, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, or otherwise discriminate against any of you for striking or engaging otherwise in concerted protected activity.

WE WILL NOT in any like or related manner interfere with restrain, or coerce you in the exercise of the rights quaranteed you by Section 7 of the Act.

WE WILL offer Santos Diaz, Antonio Lopez, Rafael Naraes, and Jose Rivera immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their suspensions and discharges, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful discharges of Santos Diaz, Antonio Lopez, Rafael Naraes and Jose Rivera and notify them in writing that this has been done and that the discharges will not be used against them in any way.

MIKE YUROSEK & SON, INC.